Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
1993 Annual Access Tariff Filings	)	CC Docket No. 93-193
	)	
1994 Annual Access Tariff Filings	)	CC Docket No. 94-65
	)	

APPLICATION FOR REVIEW OF BUREAU ORDER

Pursuant to 47 C.F.R. §§ 1.104 and 1.115, BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that this Commission review the Order of the Wireline Competition Bureau ("Bureau") issued on July 15, 2005 (the "*July 15, 2005 Order*")[1] in the above-captioned dockets.

QUESTION PRESENTED

Whether it is inequitable to order refunds when, among other things, the Commission failed to provide BellSouth and other ILECs with notice of any course of action that could protect it from refund liability and refunds will not go to the only parties even arguably harmed by the conduct at issue here, but instead will give a windfall to certain carriers that have already been compensated for any extra costs they incurred.

STATEMENT OF FACTS

The *July 15, 2005 Order* arises from the Commission's investigation into the decision of BellSouth and other ILECs not to use the so-called "add-back methodology" in their 1993 and 1994 access tariffs. In an order issued on July 30, 2004, the Commission determined both that BellSouth's failure to use the "add-back" methodology was unlawful and that it would be

[1] Order, *1993 Annual Access Tariff Filings; 1994 Annual Access Tariff Filings*, CC Docket Nos. 93-193 & 94-65, DA 05-2029 (Chief, Pricing Policy Division, rel. July 15, 2005).

consistent with equitable requirements to mandate refunds as a result of BellSouth's allegedly unlawful action. *See* Order, *1993 Annual Access Tariff Filings; 1994 Annual Access Tariff Filings*, 19 FCC Rcd 14949, 14957-59, ¶¶ 16-20 (2004) ("*2004 Order*").

In BellSouth's view, the Commission erred in the *2004 Order*, both in finding that the failure to use add-back violated then-existing law and in analyzing the equities of requiring refunds in this instance. BellSouth filed a petition for review challenging the *2004 Order* in the United States Court of Appeals for the District of Columbia Circuit and has now filed briefs together with Verizon in support of that petition. Those briefs challenge both the Commission's liability determination and its determination that refunds are equitable in this case.[2]

In response to the opening brief filed by BellSouth and Verizon in that case, the Commission argued in the D.C. Circuit that, until it takes action by requiring specific amounts of refunds, there has not been final agency action as to the propriety of requiring refunds *per se*, the issue is not ripe for appellate adjudication, and BellSouth lacks standing to raise it. *See, e.g.*, Brief for Respondents at 38-39, Nos. 04-1331 & 04-1332 (D.C. Cir. filed May 2, 2005) ("[T]he Commission will complete its decision-making process when it actually decides whether to impose a refund obligation, the amount of that obligation, if any, and the equitable justifications for that decision. Only if and when the Commission requires refunds will it have taken final action that permits the Court to review the adequacy of refund analysis.") (internal quotation marks and footnote omitted). BellSouth's petition for review remains pending in the D.C. Circuit, and oral argument is now scheduled for October 21, 2005.

While the lawfulness of the *2004 Order* was being briefed in the D.C. Circuit, the Bureau was engaged in determining precisely how to calculate the refunds that the prior Commission

[2] *See Verizon Tel. Cos., et al. v. FCC, et al.*, Nos. 04-1331 & 04-1332 (D.C. Cir.).

order concluded were appropriate. In the *July 15, 2005 Order*, the Bureau approved BellSouth's plan for calculating refunds.

BellSouth now seeks Commission review of that Bureau order — and, in particular, of the ruling embedded in that order that refunds are warranted in the circumstances of this proceeding — in order to ensure that the Commission's refund decision will be subject to judicial review if the D.C. Circuit concludes that review is not available until the Commission issues an order specifying the precise amount that BellSouth must pay in refunds.

ARGUMENT

Review should be granted under 47 C.F.R. § 1.115(b)(2)(i) because requiring refunds in this case is inconsistent with precedent establishing the equitable principles relevant to a refund inquiry. Even assuming, as the Commission has found, that BellSouth's 1993 and 1994 access tariffs were unjust and unreasonable because they did not use the add-back methodology, the Commission is required to balance the equities to determine whether ordering refunds is in the public interest. *See, e.g.*, *Public Serv. Comm'n v. Economic Regulatory Admin.*, 777 F.2d 31, 36 & n.5 (D.C. Cir. 1985); *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981).

In this instance, granting refunds is inequitable and inconsistent with the public interest because it would provide an undeserved windfall to a few interexchange carriers that have likely long passed on any additional costs. For instance, the record indicates that AT&T, by far the largest interexchange carrier at the time and thus the primary recipient of any refund, was able to pass on to its end-user customers any additional access-charge costs that it incurred because of the LECs' failure to use an add-back methodology.[3] Consequently, any refunds paid to AT&T

[3] *See* Verizon Comments at 17, CC Docket Nos. 93-193 & 94-65 (FCC filed May 5, 2003) (explaining that AT&T incorporated these cost increases into its own 1993 tariff filings); Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation,

more than a decade after the fact would go directly into AT&T's pocket, giving it a wholly unwarranted windfall.

Moreover, even if the Commission could and did require AT&T and other interexchange carriers to pass on any refunds to end-user customers — a step that it has not taken and has not claimed the authority to take — there is still no equitable basis for that result. Given the churn in the market for interexchange services, it is unlikely that many of AT&T's or any other interexchange carrier's current customers were its customers in 1993 and 1994. On the contrary, many of those carriers' customers at that time are likely now served by BOCs such as BellSouth, which were barred from providing interexchange services in 1993 and 1994 but have all now obtained authority to do so under 47 U.S.C. § 271. Requiring BellSouth to provide refunds would thus be particularly unfair, because it would siphon away from BellSouth funds that it currently uses to serve many 1993-1994 AT&T customers and redirect those funds either to AT&T, which has *already* been compensated, or to a different set of end-users that were never harmed by the allegedly improper methodologies that BellSouth used more than a decade ago.

These complications exist, moreover, in large part because the Commission ignored Congress's direction to decide tariff investigations within 12 months. *See* 47 U.S.C. § 204(a)(2)(B). Because of the agency's delay, BellSouth has been left in suspended animation on this issue for more than a decade and is now being told to grant refunds even though there is no way that those payments will ever benefit the only parties that were even arguably harmed by BellSouth's add-back decisions. *Compare* Memorandum Opinion and Order, *Tariffs Implementing Access Charge Reform*, 13 FCC Rcd 14683, 14753, ¶ 178 (1998) (refusing to

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AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462 and 5464, 8 FCC Rcd 6227 (1993). As the dominant interexchange carrier at the time, AT&T's incorporation of these cost increases allowed other interexchange carriers to do the same. Consequently, they stand to gain the same windfalls.

order refunds because the "significant administrative costs — both to industry and to the Commission — . . . outweigh[] the benefit that would be gained from determining precisely which particular [interexchange carrier] paid more"). That factor too should weigh heavily in the equitable balance.

Finally, contrary to the Commission's fleeting suggestion in the *2004 Order* that "LECs were on notice from the time their tariffs were suspended," 19 FCC Rcd at 14959, ¶ 20, no such notice was given in the suspension order that started this tariff investigation. As explained in *Illinois Bell Telephone Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992), section 204 requires "that the statement suspending a rate inform the carrier in writing of the Commission's reasons for the suspension" so that the carrier "may realize that the FCC's objections are well taken, or not worth a fight, and it may seek to bring itself within compliance and obviate the whole process." *Id.* at 1482. In this instance, however, the Commission's suspension order did not provide the LECs with any guidance as to a particular course of conduct that they could undertake that would avoid refunds. On the contrary, when the Commission suspended the tariffs in 1993, it did so for *all* carriers that "had a sharing amount or low end adjustment based on 1991 earnings," *1993 Suspension Order*,[4] 8 FCC Rcd at 4965, ¶ 32, both those that did and those that did not employ add-back. Indeed, the suspension order specifically highlighted AT&T's complaints about the actions of NYNEX and SNET, two LECs that *did* use an add-back methodology (having subtracted out moneys received from a low-end adjustment in determining their 1992 earnings). *See id.* ¶¶ 30-31. Having left LECs to their own devices in figuring out how best to apply the

[4] Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, *1993 Annual Access Tariff Filings; National Exchange Carrier Association Universal Service Fund and Lifeline Assistance Rates; GSF Order Compliance Filings; Bell Operating Companies' Tariff for the 800 Service Management System and 800 Data Base Access Tariffs*, 8 FCC Rcd 4960 (Acting Chief, Common Carrier Bur. 1993) ("*1993 Suspension Order*").

rules, the Commission may not equitably require refunds now based on the Commission's hindsight about what its rules should have prescribed, but did not, at the time.

As discussed above, BellSouth believes that the Commission has already decided these issues regarding the equity of granting refunds (albeit wrongly) in its *2004 Order*, and that this issue is properly before the D.C. Circuit now. The Commission has taken a contrary position, however. Accordingly, to ensure that BellSouth will be able to seek judicial review of this issue, BellSouth is seeking Commission review of the Bureau's decision imposing a specific refund, as the Commission has claimed is necessary.

BellSouth challenges here not the Bureau's decision to approve BellSouth's specific plan of refunds — a plan that was submitted in compliance with the Commission's prior order to do so — but rather the underlying ruling that refunds are warranted in the circumstances of this case. The Commission's order disposing of this application for review will thus allow BellSouth to seek judicial review of the Commission's underlying refund decision should the court of appeals accept the Commission's argument that the prior refund decision is reviewable only after the Commission has issued an actual order directing BellSouth to pay a specific amount of refunds.

Respectfully submitted,

/s/

MARK L. EVANS
SEAN A. LEV
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for BellSouth Telecommunications, Inc.

August 12, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of August 2005, I caused a copy of the foregoing Application for Review of Bureau Order to be served upon each of the parties on the attached service list by first-class mail, postage prepaid.

/s/
David M. Burke

SERVICE LIST

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Tamara L. Preiss
Chief, Policy Pricing Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-A225
Washington, D.C. 20554

UNITED STATES OF AMERICA

Catherine G. O'Sullivan
Robert J. Wiggers
Robert B. Nicholson
U.S. Department of Justice
Antitrust Division – Appellate Section
950 Pennsylvania Avenue, N.W.
Room 3224
Washington, D.C. 20530-0001

AT&T CORP.

David W. Carpenter
Sidley Austin Brown & Wood LLP
Bank One Plaza
10 South Dearborn Street
55th Floor
Chicago, Illinois 60603

David L. Lawson
Joseph R. Palmore
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005

QWEST CORPORATION

Robert B. McKenna
Qwest Corporation
607 14th Street, N.W., Suite 950
Washington, D.C. 20005

SBC COMMUNICATIONS INC.

James D. Ellis
Paul K. Mancini
SBC Communications Inc.
175 East Houston
San Antonio, Texas 78205

Gary L. Phillips
Davida M. Grant
SBC Communications Inc.
1401 I Street, N.W., Suite 400
Washington, D.C. 20005

VERIZON TELEPHONE COMPANIES

Michael E. Glover
Edward Shakin
Verizon
1515 North Courthouse Road, Suite 500
Arlington, Virginia 22201